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May 19, 2004

**EX PARTE**

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**Re: Verizon Telephone Companies Petition for Reconsideration, "In the Matter of Stale or Moot Docketed Proceedings", CC Docket Nos. 93-193, 94-65 and 94-157**

Dear Ms. Dortch:

Yesterday, Susanne Guyer, Edward Shakin and Joseph Dibella, representing Verizon, met seperately with Jessica Rosenworcel of Commissioner Copps' office and Dan Gonzalez of Commissioner Martin's office to discuss the above dockets. The materials discussed during the meeting are attached.

Please let me know if you need any further assistance.

Sincerely,

/s/Joseph Dibella

Attachment

cc: J. Rosenworcel
D. Gonzalez

**"RAO 20" Tariff Investigation**

This investigation concerns Verizon's and other ILECs' calculations, for the period 1993-1996, of the interstate rate base, which affects the rate of return and in turn the price cap carriers' sharing obligations under the old rules. The Commission's rules in effect during that period expressly defined the interstate rate base. Section 65.800 stated that the "rate base *shall consist of* the interstate portion of the *accounts listed in § 65.820 . . . , minus* any deducted items computed *in accordance with § 65.830*." 47 C.F.R. § 65.800 (1996) (emphasis added). Section 65.830, in turn, required deductions for five specified accounts, based on the Uniform System of Accounts set forth in 47 C.F.R. part 32, *see id.* § 65.810, and provided a methodology for calculating the interstate portion of those accounts, *see id.* § 65.830. With respect to one of those five accounts — Account 4310 — carriers were directed to deduct from the rate base only the "interstate portion of unfunded accrued pension costs." *Id.* § 65.830(a)(3). OPEBs, by definition, are post-retirement employee benefits *other* than pensions, and therefore were not covered by § 65.830(a)(3). *See Southwestern Bell Tel. Co. v. FCC*, 28 F.3d 165, 168 (D.C. Cir. 1994) ("The 'other,' which explains the 'O' in the OPEB acronym, is intended *to exclude pension benefits*; what is left generally consists of retirees' life insurance and medical and dental care benefits.") (emphasis added).

This investigation is referred to as "RAO 20" because, in 1992, the Common Carrier Bureau issued an advisory letter entitled RAO 20 instructing carriers to deduct OPEB liabilities from the rate base.[1] This increased their rate of return and their sharing obligations. In 1996, the Commission issued an order vacating RAO 20, on the ground that the regulations "define[d] explicitly those items to be . . . excluded from[] the interstate rate base" and the Bureau's

[1] 7 FCC Rcd 2872 (1992).

requirement to exclude OPEBs "directed [an] exclusion[] from . . . the rate base *for which the Part 65 rules do not specifically provide*."[2] In the same order, the Commission proposed an amendment to its rules to require such deductions, but carriers had to file their 1996 annual access tariffs before the Commission completed that rulemaking. In those tariffs, they followed the *RAO 20 Rescission Order* and, in calculating their sharing obligations for 1996, reversed their deduction of OPEB liabilities for the prior years' rates of return. In 1997, the Commission finalized the rulemaking and amended § 65.830 to require the deduction of OPEB liabilities from the rate base.[3] The Commission also denied a request for reconsideration of the *RAO 20 Rescission Order* and reaffirmed that "[g]iving rate base recognition to OPEB in Part 65," as RAO 20 did, "constitute[d] a *rule change*" and therefore could not be accomplished "through an interpretation" of the rules in effect from 1993-1996. *RAO 20 Rulemaking* ¶¶ 25, 28 (emphasis added).

The Commission's amendment to § 65.830 applies only prospectively. Absent express authorization from Congress — and there is none here — an agency has no authority to promulgate a rule that would retroactively "'increase a party's liability for past conduct.'" *Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 588-89 (D.C. Cir. 2001) (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994)); *see General Motors Corp. v. National Highway Traffic Safety Admin.*, 898 F.2d 165, 169 (D.C. Cir. 1990) ("a grant of legislative rulemaking

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[2] Memorandum Opinion and Order and Notice of Proposed Rulemaking, *Responsible Accounting Officer Letter 20, Uniform Accounting for Postretirement Benefits Other Than Pension in Part 32; Amendments to Part 65, Interstate Rate of Return Prescription Procedures and Methodologies, Subpart G, Rate Base*, 11 FCC Rcd 2957, ¶ 25 (1996) (emphasis added) ("*RAO 20 Rescission Order*").

[3] *See* Report and Order, *Responsible Accounting Officer Letter 20, Uniform Accounting for Postretirement Benefits Other Than Pension in Part 32; Amendments to Part 65, Interstate Rate of Return Prescription Procedures and Methodologies, Subpart G, Rate Base*, 12 FCC Rcd

authority will not be understood 'to encompass the power to promulgate retroactive rules unless that power is conveyed in express terms.'") (quoting *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988)). Because applying its 1997 amendment to § 65.830 to require refunds for a tariff filed *in 1996* would have precisely that prohibited effect, the Commission cannot rely on its decision in the *RAO 20 Rulemaking* in resolving its investigation of Verizon's 1996 tariff filings. Indeed, at the time of the *RAO 20 Rulemaking*, AT&T conceded that "any change to the Part 65 rules will affect the rate base on a prospective basis and *will not affect the pending OPEB investigations*." *RAO 20 Rulemaking* ¶ 22 (emphasis added).

Nor is the Commission free to "re-interpret" the Part 65 regulations in place prior to 1997 to compel additional deductions from the rate base beyond those specified in the rules. As described above — and as the Commission has held — the rate base rules "define[d] explicitly those items to be included in, or excluded from, the interstate rate base" *RAO 20 Rescission Order* ¶ 25. In other words, as the Commission has explained, the "rate base rules . . . list the Part 32 accounts that *are to be included in and excluded from* the rate base." *Id.* ¶ 1 n.3 (emphasis added); *accord RAO 20 Rulemaking* ¶ 9 n.16. Indeed, the rules in effect in 1996, by their terms, were mandatory and precluded carriers from including in — or excluding from — the rate base any items not expressly set forth in those rules. Thus, § 65.800 states that the "rate base *shall* consist" of specified portions of "the accounts *listed in* § 65.820," less any deductions "computed *in accordance with* § 65.830." 47 C.F.R. § 65.800 (1996) (emphases added); *see, e.g.*, *Association of Am. R.R. v. Costly*, 562 F.2d 1310, 1312 (D.C. Cir. 1977) ("'shall' is the language of command"). Similarly, § 65.830 states that the "following items *shall* be deducted from the interstate rate base." 47 C.F.R. § 65.830 (1996) (emphasis added). Nothing in the text

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2321 (1997) ("*RAO 20 Rulemaking*"). Section 65.830(a)(3) now requires deduction of the

of the rules suggests that there exist other, unspecified amounts that a carrier may be required to include in, or deduct from, the rate base.[4]

Moreover, the Commission has already *twice* held that those rules could *not* be interpreted to require the deduction of OPEBs. *See RAO 20 Rescission Order* ¶ 25 ("the Part 65 rules do not specifically provide" for deduction of OPEBs); *RAO 20 Rulemaking* ¶¶ 25, 28 (requiring deduction of OPEBs "constitute[d] a rule change" and could not be accomplished "through an interpretation" of the existing rules). Having thus "give[n] its regulation an interpretation," the Commission "can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking." *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997); *see, e.g., Air Transport Ass'n v. FAA*, 291 F.3d 49, 56-57 (D.C. Cir. 2002); *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622,

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"interstate portion of other long-term liabilities."

[4] AT&T claims that the Commission has "*never* read the Part 65 list of inclusions and deductions to be . . . exclusive," AT&T Ex Parte, CC Docket Nos. 93-193 *et al.*, at 2-3 (filed Apr. 13, 2004), but the only decision that AT&T cites — involving an investigation of an Ameritech tariff — actually supports Verizon's position. In adopting the Part 65 rules in 1987, the Commission, among other things, "reaffirmed its policy, first adopted in 1977, of excluding 'non-cash' items" from the "lead-and-lag calculations" used to determine cash working capital. *See Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776, 783 (D.C. Cir. 1990). BellSouth sought reconsideration of the Commission's decision, which it described as "exclu[ding] . . . non-cash items," such as "the cost of common stock equity," from cash working capital calculations Order on Reconsideration, *Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers*, 4 FCC Rcd 1697, ¶ 24 (1989). The Commission denied BellSouth's petition, finding that it had correctly excluded equity expenses, and other non-cash items, from its cash-working-capital rule. *See id.* ¶¶ 28-32. Ameritech, however, later claimed that the 1989 order denying reconsideration was the "first time" the Commission held that equity was among the non-cash expenses excluded from cash working capital and, therefore, that Ameritech properly included an "equity component in its [1988] cash working capital." Order to Show Cause, *Ameritech Telephone Operating Companies*, 10 FCC Rcd 5606, App. A, ¶ 5 (1995). The Commission rejected that claim, explaining (as BellSouth had recognized) that its "cash working capital" rules had "always" been limited to "*cash* expenses." *Id.* ¶ 6 (emphasis added). The Commission thus did not, as AT&T claims, *add* a new requirement to its rate base rules during a tariff investigation; it instead

629 (5th Cir. 2001); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1028 (D.C. Cir. 2000); *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1033-34 (D.C. Cir. 1999). As explained above, such a new regulation can apply prospectively *only*. In any event, even if the Commission could change its interpretation of § 65.830(a)(3) retroactively, this tariff investigation is not the type of rulemaking that would permit the Commission formally to modify a regulation or a prior interpretation of a regulation. *See* Memorandum Opinion and Order, *Investigation of Special Access Tariffs of Local Exchange Carriers*, 5 FCC Rcd 4861, ¶¶ 7-8 (1990) ("*Special Access Tariffs Order*") ("Section 204(a) are rulemakings of particular applicability," in which the Commission "merely applies the obligations imposed by the statute or *previously adopted Commission rules* to particular carrier conduct") (emphasis added); *see also Southwestern Bell*, 28 F.3d at 169 (Commission, in tariff investigation, "was bound to follow [existing rules] until such time as it altered them through another rulemaking").

The Commission cannot evade this limitation by suggesting that, because different accounting rules applied to OPEBs when the Commission promulgated its rate base rules, the Commission now has discretion in the context of a tariff proceeding to find that a carrier's treatment of OPEBs was not just and reasonable. When the Commission promulgated those rules in 1987, no different from today, Account 4310 included not only "amounts accrued . . . [for] unfunded pensions," but also "other long-term liabilities not provided for elsewhere." 47 C.F.R. § 32.4310(a) (1987). In its Notice of Proposed Rulemaking, the Commission proposed to define the amounts to be deducted from the rate base as the "interstate portion of zero-cost funds," defined as "*all* funds . . . provided to a carrier without cost to the carrier." *Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Bases and Net Incomes*

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rejected a carrier's misinterpretation of those rules. *See id.* (holding that its rules "cannot

*of Dominant Carriers*, 2 FCC Rcd 332, App. A (1986) (proposed 47 C.F.R. §§ 65.810(b), 65.830) (emphasis added). Such a rule, if adopted, would have included not only pensions, but also any zero-cost "other long-term liabilities" that might be included in Account 4310. But the Commission did not adopt its proposed rule. Instead, it replaced its broad, all-zero-cost-funds proposed rule with a rule listing the specific portions of specific accounts that "shall" be deducted from the rate base — including the "interstate portion of unfunded accrued pension costs (Account 4310)," but not any other portion of that account. Report and Order, *Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers*, 3 FCC Rcd 269, Appendix B (1987) ("*Rate Base Components Order*") (promulgating 47 C.F.R. § 65.830).

Therefore, long before the Commission approved a change to the accounting rules for OPEBs, the rate base rules singled out pension expenses for special treatment — deduction from the rate base — that did not apply to analogous "other long-term liabilities" included in Account 4310. And when the Commission upheld the portion of RAO 20 that required carriers to include OPEBs in Account 4310, it explained that this account includes "amounts accrued for such items as . . . other long-term liabilities not provided for elsewhere in Part 32" and that "[u]nfunded OPEB liabilities fall into this category." *RAO 20 Rescission Order* ¶ 25. In other words, the Commission held that OPEBs are among the portions of Account 4310 that expressly are *not* required to be deducted from the rate base. As the Commission previously recognized, it could not require deduction from the rate base of one of these "other long-term liabilities" — namely,

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logically or legally be relied upon to justify including equity in [pre-1989] calculations").

OPEBs — "through an interpretation" of its existing rules, but instead "a rule change" would be required to give "rate base recognition to OPEB in Part 65." *RAO 20 Rulemaking* ¶¶ 25, 28.[5]

Finally, Verizon's compliance with the Commission's contemporaneous interpretation of its rules — which "d[id] not specifically provide" for deduction of OPEBs from the rate base[6] — cannot be grounds for finding that its 1996 tariff filings were unjust or unreasonable. As explained above, in a tariff investigation, the Commission assesses the lawfulness of "particular carrier conduct" against "the obligations imposed by the statute or *previously adopted* Commission rules." *Special Access Tariffs Order* ¶ 8 (emphasis added).

In sum, the Commission has already decided that its prior rules did not require the deduction of OPEBs from the rate base and has no authority to modify its interpretation of those rules or otherwise to find Verizon liable for complying with those rules.

[5] Because the Commission's pre-1997 rate base regulations were unambiguous, any new interpretation of those regulations to require deduction of OPEBs would receive no deference. *See Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (deference to an agency's interpretation of its regulation "is warranted only when the language of the regulation is ambiguous"). Where a regulation is unambiguous, courts construe the regulation according to its plain meaning and reject any inconsistent agency interpretation, because to defer to such an interpretation "would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Id.*; *see Garvey v. National Transp. Safety Bd.*, 190 F.3d 571, 580 (D.C. Cir. 1999); *Hoctor v. Department of Agric.*, 82 F.3d 165, 171 (7th Cir. 1996); *Municipal Resale Serv. Customers v. FERC*, 43 F.3d 1046, 1053 (6th Cir. 1995).

[6] *RAO 20 Rescission Order* ¶ 25.

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May 13, 2004

**EX PARTE**

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**Re: 1993 Annual Access Tariffs, CC Docket No. 93-193; 1994 Annual Access Tariffs, CC Docket No. 94-65**

Dear Ms. Dortch:

As Verizon has demonstrated in its comments, the Commission cannot legally apply its "add-back" rule retroactively to tariffs filed prior to the 1995 effective date of the add-back rule change. In *Bell Atlantic Telephone Companies v. FCC*, 79 F.3d 1195, 1207 (D.C. Cir. 1996) the Court found that the enforcement of the rule in the 1995 annual access tariff filings was acceptable because it only affected the 1995 tariffs, even if it calculated a carrier's rate of return for the 1994 base year using add-back. The Court made it clear that the new rules did not apply to earlier tariffs or require refunds of money collected under those tariffs. ***See*** *id.* at 1206.

If the Commission nonetheless concludes that it is legally authorized to order refunds in this context, it should exercise its well-established equitable discretion not to do so. The ordering of refunds in a tariff investigation is not automatic. To the contrary, refunds are "a matter of equity," and the Commission must "balance the interests of both the carrier and the customer in determining the public interest," with "each case . . . examined in light of its own particular circumstances." *American Television Relay,*[1] ¶ 15; *see Public Service Comm'n v. Economic*

[1] Memorandum Opinion and Order, *American Television Relay, Inc., Refunds Resulting from the Findings and Conclusions in Docket 19609*, 67 F.C.C.2d 703 (1978).

*Economic Regulatory Admin.*, 777 F.2d 31, 36 & n.5 (D.C. Cir. 1985); *Las Cruces TV Cable v. FCC*, 645 F.2d 1041, 1047 (D.C. Cir. 1981). As the D.C. Circuit has explained, "once the Commission finds that a carrier has exceeded (as a pure mathematical matter) its prescribed rate of return, it then should consider other relevant factors in determining whether a rate is unreasonable and a refund warranted. *Virgin Islands Tel. Corp. v.* FCC, 989 F.2d 1231, 1239 (D.C. Cir. 1993).[2] Those factors include (1) whether the LECs' projections were reasonable when made, (2) the actual harm suffered by the ratepayer, and (3) any overriding equitable considerations. *Id.* at 1240. Applying a similar standard, the Commission has found it inappropriate to order refunds in a number of proceedings where it found that a carrier had overearned.[3]

Here, the factors set forth in *Virgin Islands* likewise militate against a refund. The first factor (reasonable projections) is directly relevant only in a rate-of-return context, which is not applicable here. Nonetheless, by analogy, the LECs that did not use add-back in 1993 and 1994 acted eminently reasonably, since the Commission did not mandate the use of add-back until 1995.

The second factor (ratepayer harm) likewise counsels against a refund because there is no reason to believe there was any harm to access customers here. Rather, AT&T and other IXCs undoubtedly passed the LECs' access charges through to customers as an element of their long distance rates. *See AT&T Communications Tariff FCC Nos. 1 and 2 Transmittal Nos. 5460, 5461, 5462 and 5464*, 8 FCC Rcd 6227 (1993). While end users may have paid more than they should have for long distance services, there is no mechanism for assuring that they would receive the benefit of any refund now, so any refund (or forward-looking reduction in the PCI) would simply create a windfall for IXCs – many of whom did not even exist in 1993 and 1994.[4] And even if IXCs passed through refunds (or lower access charges) to their customers – and there is no reason to believe they will – the customers that would benefit are not those that suffered harm from alleged overcharges in the early 1990s. Not only has the passage of time changed the composition of the customers that use long-distance services, but those customers now use cell phones, cable telephony, and e-mail as substitutes for wireline long distance service.

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[2] The same principle holds true in the price cap context, since the court was interpreting Section 204 of the Act, which applies to tariff investigations under any regulatory framework.

[3] *See, e.g.*, Memorandum Opinion and Order, *Tariffs Implementing Access Charge Reform*, 13 FCC Rcd 14683 (1998); Memorandum Opinion and Order, *Local Exchange Carrier Access Tariff Rate Levels; Bell Atlantic Telephone Companies Tariff F.C.C. No. 1; GVNW Inc./Management Bourbeuse Telephone Company Tariff F.C.C. No. 1*, 8 FCC Rcd 6202 (1993); Memorandum Opinion and Order, *Investigation of Special Access Tariffs of Local Exchange Carriers*, 5 FCC Rcd 1717 (1990).

[4] Ordering a refund that has the effect of reducing access charges also would go beyond the rate reductions called for in the *CALLS Order* and thereby undo the guarantee of a particular rate level for switched access that was part of the CALLS compromise. *See Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers*, 15 FCC Rcd 12962, ¶ 166 (2000).

The third factor (general equitable considerations) also militates against a refund. As Verizon previously has explained, it reasonably relied on the *Bell Atlantic* court's ruling that the new add-back rules did not require refunds. ***See*** *Bell Atlantic* at 1207 (application of the add-back rule to the 1995 annual access tariffs was not retroactive because it "does not change the past legal consequences of carriers' decisions to choose" the X-factors in previous annual access tariff filings). It is patently unfair to undermine that reliance here – particularly since the lengthy delay in resolving this issue has prejudiced Verizon's ability to defend the tariff filings at issue. In the more than ten years since the Bureau initiated the first of these investigations, key personnel and expert witnesses who helped prepare Verizon's tariff filings have left the company or moved on to other responsibilities, and memories have faded. It is inequitable for the Commission to order refunds when its own delay has compromised a party's ability to defend its decade-old tariff filings and therefore has contributed to an adverse ruling on the tariff's lawfulness.

If the Commission nonetheless determines that (1) it has authority to apply the add-back rule retroactively in the above-referenced 1993 and 1994 tariff investigations, and (2) some form of refund would be equitable, it should require refunds due as a result of any tariff revisions to be developed only on a total company basis.[5] The Commission should not require the carriers to provide refunds for study areas that would have had increased sharing obligations (and lower rates) without offsetting the amounts by which other study areas would have had larger lower formula adjustments (and higher rates). For example, during the period at issue, the former GTE companies had twenty-six interstate tariff entities. ***See*** GTE Reply Comments, CC Docket No. 93-179 at 10 (filed Sep. 1, 1993). In 1991, some of these tariff entities were in the sharing mode and some were in the lower formula adjustment mode. This resulted in adjustments to 1992-1993 revenues (revenue reductions for sharing entities and revenue increases for lower formula adjustment entities). When GTE filed its access tariffs in 1993 and 1994, it did not apply add-back to any of its 1992 and 1993 revenues, regardless of whether the tariff entity was under sharing or lower formula adjustment. In other words, it did not add the revenues in the sharing states or reduce revenues in the lower formula adjustment states. This was consistent with its view that the Commission's price cap rules did not incorporate the add-back mechanism that had been part of the previous rate-of-return enforcement mechanism. GTE pursued a consistent approach in all tariff entities, despite the fact that applying add-back in the lower-formula-adjustment entities would have increased the lower formula adjustment and allowed higher rates.

If GTE were required to provide refunds to reflect the increased sharing obligations produced by add-back, it should be allowed to offset its refunds by the amount of increased lower formula adjustment that it would have obtained through add-back. As explained above, the ordering of refunds in a tariff investigation is not automatic – it is an equitable decision within

[5] The offset calculation, moreover, should aggregate both tariff years (1993 and 1994). GTE should not be required to provide refunds for one year if the higher rates due to addback in the other year would offset some or all of those refunds. Failing to do so could expose the company to financial liability when none should apply, since the IXCs that purchased access in 1993 almost certainly did so in 1994 as well.

the Commission's discretion. ***See, e.g.***, *Las Cruces TV Cable v. FCC*, 645 F.2d at 1047-8. Here, fundamental fairness dictates that a carrier such as GTE, which had different tariff entities for different study areas, should not be treated differently than a carrier with a single tariff entity for multiple study areas. Otherwise, a carrier with multiple tariff entities would be able to protect itself only by adopting the ratemaking methodology that maximized revenues in each study area, regardless of whether the approaches in different study areas were inconsistent. Access customers, who generally obtained GTE services in all study areas, would be unjustly enriched if they were to receive refunds in the sharing areas without offset from the higher rates due to add-back in the lower formula adjustment areas. A carrier such as GTE should not be penalized for adopting a consistent position on add-back across all of its study areas.

The D.C. Circuit's decision in *MCI Telecommunications Corp. v. FCC*, 59 F.3d 1407 (D.C. Cir. 1995) in no way constrains the Commission's ability to exercise its equitable discretion to offset refunds by the amount of an increased lower formula adjustment that the GTE entities, taken as a whole, could have obtained through add-back. The *MCI* case arose in an entirely different context – complaints for refunds based on violations of the Commission's category-specific rate of return prescriptions. In that context, the court explained that the Commission's hands were tied: unlike a Section 204 tariff investigation, where the Commission has permissive authority to determine refund liability, "[i]n the present cases ... the Commission is responding to complaints brought by customers of the LECs under § 206 of the Act, which is phrased in mandatory terms. ... Therefore, the factors that we set out in the *Virgin Islands* case do not apply where, as here, the Commission is adjudicating a damage claim made by a customer pursuant to § 206." *Id.* at 1414. Here, in contrast, the Commission's discretionary authority under § 204 is unconstrained – and, given that the Commission has discretion not to order refunds at all, it must have discretion to determine how much any refunds should be, taking into account the equitable factors discussed above.

In addition, the specific considerations relied on by the D.C. Circuit in invalidating the Commission's "limited offset" policy, which reduced damages for overearnings in one category by a LEC's underearnings in other access categories, do not apply here. The court held that the limited offset policy (1) was inconsistent with FCC precedent that prevented the Commission from using claims by carriers against customers to offset claims by customers against carriers, (2) amounted to an implicit determination that the defendant LEC was entitled to earn more than the amount that it actually earned from the rates it charged, even though there was no such entitlement under rate of return regulation, and (3) discriminated between those IXCs that filed complaints and those that did not. *Id.* at 1417-1420.

The Commission's precedent against using claims by carriers against customers as an offset in determining damages in the § 206 context is irrelevant here because this case arises under § 204, not § 206. There are no claims between carriers and customers in either direction; this is simply a tariff investigation. Nor would an equitable offset here violate rate of return regulation, for the simple reason that this case arises under price cap regulation. Indeed, while the Commission had stated that the authorized rate of return is only a maximum, not a minimum,

the opposite holds true for the low-end adjustment. Here, LECs were entitled to earn at least 10.25 percent under price cap regulation; the failure to do so enabled them to claim a low-end adjustment. If LECs are forced to refund in sharing states but not to offset the amount of that reduction based on underearnings in low-end adjustment states, the very premise of the price cap framework would be violated. Finally, there is no discrimination among IXCs here because, once again, this is a tariff investigation, not a complaint case. And, even apart from the different legal context, there is every reason to believe, as noted above, that IXCs would have taken access services throughout GTE's service area, ameliorating any concern that some IXCs would receive more than they should and some less.

Sincerely,

/s/Joseph DiBella

cc: T. Preiss
D. Shetler

Verizon Followed the Commission's Accounting Rules

These cases go back over ten years. The issue in each case is whether Verizon complied with the Commission's accounting rules as they existed at that time, not as they were later amended. In all cases, Verizon followed the Commission's rules. The Commission should not do again what it has already been criticized by the D.C. Circuit for doing in the context of OPEB accounting requirements – "concocting a new rule in the guise of applying the old." *Southwestern Bell v. FCC*, 28 F.3d 165, 173 (D.C. Cir. 1994).

Pre-1993 OPEB costs. This deals with the exogenous adjustment associated with the OPEB accounting rule change. In 1990, the Financial Accounting Standards Board adopted the "OPEB" accounting rule, which required companies to accrue liabilities for "Other Post-Employment Benefits," consisting mainly of health care benefits for retirees. The Commission approved this change for USOA accounting purposes on December 26, 1991, requiring carriers to make it effective "on or before January 1, 1993," and stating that "earlier implementation is encouraged." *Southwestern Bell GTE Service Corp. Notification of Intent to Adopt Statement of Financial Accounting Standards No. 106*, 6 FCC Rcd 7560, ¶¶ 2, 3 (1992). Bell Atlantic informed the Commission on December 31, 1991, that it had implemented that accounting practice starting with the year 1991. In 1993, after the Commission indicated that the carriers could file tariffs seeking exogenous adjustments for certain types of OPEB costs, Bell Atlantic filed tariffs for its 1991 through 1993 OPEB costs. In the meantime, in the *Southwestern Bell* decision, the D.C. Circuit recognized that the Commission's "control" test for exogenous costs – that a cost must be beyond the control of the carrier – was met for the OPEB change "simply by the fact of the exogenous imposition of the accounting rule." 28 F.3d at 170. This meant that Bell Atlantic had met the test once the Commission approved the accounting change. The fact that Bell Atlantic may have had some "control" over the year in which it adopted the accounting change – after being encouraged by the Commission to adopt it early – does not change that result.

RAO 20. This concerns the calculation of the interstate rate base, which affects the rate of return and in turn the price cap carriers' sharing obligations under the old rules for the period 1993-1996. The Commission's rules in effect during that period explicitly defined the rate base. Section 65.800 stated that it consists of the specific asset accounts listed in section 65.820 minus the deductions listed in section 65.830 (the text of the two provisions are attached). In 1996, the deductions in section 65.830 included accrued pension liabilities, but they did not include OPEBs, which by definition are benefits *other* than pensions.

This issue is called "RAO 20" because the Common Carrier Bureau issued an advisory letter entitled RAO 20 in 1992 instructing the carriers to deduct OPEB liabilities from the rate base. This increased their rate of return and their sharing obligations. In 1996, the Commission issued an order reversing RAO 20, because there was no way to interpret section 65.830 as requiring deduction of OPEB liabilities. *RAO 20 Rescission Order*, 11 FCC Rcd. 2957 (1996) (¶¶ 25-32 are attached). In the same order, the

Commission proposed a rule change to require such deductions, but in the meantime the carriers had to file their 1996 annual access tariffs. In those tariffs, they followed the ruling of the *RAO 20 Rescission Order* and reversed the deduction of OPEB liabilities for the prior years' rate of return to calculate the sharing obligations for 1996. It was not until 1997 that the Commission finalized the rulemaking and changed section 65.830 to require deduction of OPEB liabilities from the rate base. Since rulemakings only have prospective effects, Verizon applied this rule in the 1997 and later tariff filings. In the 1997 rulemaking order, the Commission specifically found that the previous rules could not be interpreted to allow deduction of OPEB liabilities from the rate base. ***See*** *RAO 20 Rulemaking*, 12 FCC Rcd 2321, ¶¶ 25, 28 (1997) (attached). Since the Commission has already found that, under the terms of its rules in effect during the period at issue, "[s]ections 65.820 and 65.830 of our rules define explicitly those items to be included in, or excluded from, the interstate rate base" (*RAO 20 Rescission Order*, ¶ 25) and that "accrued OPEB liabilities are not removed from the rate base" (id., ¶ 32), there is no basis to impose such a requirement.

Add-Back. "Add-back" is a procedure under which the rate of return that was used to compute a price cap carrier's sharing obligation included an adjustment to the previous year's revenues to add sharing amounts or deduct lower formula adjustment amounts that were included in the prior rate case. In 1993, the Commission changed the form used to calculate rate of return in the prior regime and removed the line for calculation of an add-back adjustment. At the time, add-back was neither required nor prohibited – the Commission explained that "this issue was neither expressly discussed in the LEC price cap orders, nor clearly addressed in our Rules." *Price Cap Regulation of LEC Rate of Return Sharing and Lower Formula Adjustment,* 8 FCC Rcd 4415, ¶ 4 (1993). While it had proposed a rule requiring add-back, the Commission deliberated two years as to the correct rule. In 1995, the Commission adopted a rule for the first time explicitly requiring add-back for sharing calculations. When the D.C. Circuit upheld a challenge to the 1995 rule change, it noted that the rule change was not impermissibly retroactive because it was prospective only – it applied only to the 1995 and later tariff filings. *Bell Atlantic v. FCC*, 79 F.3d 1195, 1206 (D.C. Cir. 1996). As a result it did not "change or invalidate any current tariffs" and so only had secondary retroactive effect, which could be upheld if reasonable. *Id.* This contrasts with the period prior to the rule change, where an add-back requirement would "change the past legal consequences" of carriers' decisions. *Id.*

The issue here is whether add-back was required for the 1993 and 1994 annual access tariff filings. Since it was not addressed in the price cap rules, some carriers did it while others did not. Either approach was a reasonable interpretation of the accounting rules prior to the time that the Commission adopted the add-back rule, because neither approach was guaranteed to maximize a carrier's revenues – it would depend on whether a carrier would be in an under-earning or over-earning situation in the future, which no carrier could predict. The Commission should not penalize carriers that did not apply the add-back requirement prior to the rule change.

§69.121; Common Line, §§69.104-69.105; and an aggregated category consisting of Line Termination, §69.106, Intercept, §69.108, Local Switching, §69.107, Transport, §§69.110-69.112, 69.124, 69.125, and Information, §69.109. The Billing and Collection access element shall not be included in any access service category for purposes of this part. The Commission will also separately review exchange carrier overall interstate earnings subject to this part for determining compliance with the maximum allowable rate of return determined by §65.700(b).

(b) For exchange carriers, earnings shall be measured for purposes of determining compliance with the maximum allowable rates of return separately for each study area; provided, however, that if the carrier has filed or concurred in access tariffs aggregating costs and rates for two or more study areas, the earnings will be determined for the aggregated study areas rather than for each study area separately. If an exchange carrier has not utilized the same level of study area aggregation during the entire two-year earnings review period, then the carrier's earnings will be measured for the entire two-year period on the basis of the tariffs in effect at the end of the second year of the two-year review period; provided, however, that if tariffs representing a higher level of study area aggregation were not in effect for at least eight months in the second year, then the carrier's earnings will be measured on the basis of the study area level of aggregation in effect for the majority of the two-year period; provided further, that any carrier that was not a member of the National Exchange Carrier Association or other voluntary pools for both years of the two-year review period will have its earnings reviewed individually for the full two-year period.

[51 FR 11034, Apr. 1, 1986, as amended at 57 FR 54719, Nov. 20, 1992; 58 FR 48763, Sept. 17, 1993; 60 FR 28546, June 1, 1995]

## Subpart G—Rate Base

SOURCE: 53 FR 1029, Jan. 15, 1988, unless otherwise noted.

### §65.800 Rate base.

The rate base shall consist of the interstate portion of the accounts listed in §65.820 that has been invested in plant used and useful in the efficient provision of interstate telecommunications services regulated by this Commission, minus any deducted items computed in accordance with §65.830.

### §65.810 Definitions.

As used in this subpart "account xxxx" means the account of that number kept in accordance with the Uniform System of Accounts for Class A and Class B Telecommunications Companies in 47 CFR part 32.

### §65.820 Included items.

(a) *Telecommunications Plant.* The interstate portion of all assets summarized in Account 2001 (Telecommunications Plant in Service) and Account 2002 (Property Held for Future Use), net of accumulated depreciation and amortization, and Account 2003 (Telecommunications Plant Under Construction), and, to the extent such inclusions are allowed by this Commission, Account 2005 (Telecommunications Plant Adjustment), net of accumulated amortization. Any interest cost for funds used during construction capitalized on assets recorded in these accounts shall be computed in accordance with the procedures in §32.2000(c)(2)(x) of this chapter.

(b) *Material and Supplies.* The interstate portion of assets summarized in Account 1220.1 (Material and Supplies).

(c) *Noncurrent Assets.* The interstate portion of Class B Rural Telephone Bank stock contained in Account 1402 (Investment in Nonaffiliated Companies) and the interstate portion of assets summarized in Account 1410 (Other Noncurrent Assets), Account 1438 (Deferred Maintenance and Retirements), and Account 1439 (Deferred Charges) only to the extent that they have been specifically approved by this Commission for inclusion. Otherwise, the amounts in accounts 1401-1500 shall not be included.

(d) *Cash Working Capital.* The average amount of investor-supplied capital needed to provide funds for a carrier's day-to-day interstate operations. Class

A carriers may calculate a cash working capital allowance either by performing a lead-lag study of interstate revenue and expense items or by using the formula set forth in paragraph (e) of this section. Class B carriers, in lieu of performing a lead-lag study or using the formula in paragraph (e) of this section, may calculate the cash working capital allowance using a standard allowance which will be established annually by the Chief, Common Carrier Bureau. When either the lead-lag study or formula method is used to calculate cash working capital, the amount calculated under the study or formula may be increased by minimum bank balances and working cash advances to determine the cash working capital allowance. Once a carrier has selected a method of determining its cash working capital allowance, it shall not change to an optional method from one year to the next without Commission approval.

(e) In lieu of a full lead-lag study, carriers may calculate the cash working capital allowance using the following formula.

(1) Compute the weighted average revenue lag days as follows:

(i) Multiply the average revenue lag days for interstate revenues billed in arrears by the percentage of interstate revenues billed in arrears.

(ii) Multiply the average revenue lag days for interstate revenues billed in advance by the percentage of interstate revenues billed in advance. (Note: a revenue lead should be shown as a negative lag.)

(iii) Add the results of paragraphs (e)(1) (i) and (ii) of this section to determine the weighted average revenue lag days.

(2) Compute the weighted average expense lag days as follows:

(i) Multiply the average lag days for interstate expenses (*i.e.*, cash operating expenses plus interest) paid in arrears by the percentage of interstate expenses paid in arrears.

(ii) Multiply the average lag days for interstate expenses paid in advance by the percentage of interstate expenses paid in advance. (Note: an expense lead should be shown as a negative lag.)

(iii) Add the results of paragraphs (e)(2) (i) and (ii) of this section to determine the weighted average expense lag days.

(3) Compute the weighted net lag days by deducting the weighted average expense lag days from the weighted average revenue lag days.

(4) Compute the percentage of a year represented by the weighted net lag days by dividing the days computed in paragraph (e)(3) of this section by 365 days.

(5) Compute the cash working capital allowance by multiplying the interstate cash operating expenses (*i.e.*, operating expenses minus depreciation and amortization) plus interest by the percentage computed in paragraph (e)(4) of this section.

[54 FR 9048, Mar. 3, 1989, as amended at 60 FR 12139, Mar. 6, 1995]

### § 65.830 Deducted items.

(a) The following items shall be deducted from the interstate rate base.

(1) The interstate portion of deferred taxes (Accounts 4100 and 4340).

(2) The interstate portion of customer deposits (Account 4040).

(3) The interstate portion of unfunded accrued pension costs (Account 4310).

(4) The interstate portion of other deferred credits (Account 4360) to the extent they arise from the provision of regulated telecommunications services. This shall include deferred gains related to sale-leaseback arrangements.

(b) The interstate portion of deferred taxes, customer deposits and other deferred credits shall be determined as prescribed by 47 CFR part 36.

(c) The interstate portion of unfunded accrued pension costs shall bear the same proportionate relationship as the interstate/intrastate expenses which give rise to the liability.

[54 FR 9049, Mar. 3, 1989]

## PART 68—CONNECTION OF TERMINAL EQUIPMENT TO THE TELEPHONE NETWORK

### Subpart A—General

Sec.

*Responsible Accounting Officer Letter 20, Uniform Accounting for Postretirement Benefits Other Than Pensions in Part 32 Amendments to Part 65, Interstate Rate of Return Prescription Procedures and Methodologies, Subpart G, Rate Base*, 11 FCC Rcd 2957 (1996)

25. After reviewing the record on this issue, we find that RAO 20 exceeded the Bureau's delegated authority to the extent that it directed exclusions from and additions to the rate base for which the Part 65 rules do not specifically provide. Sections 65.820 and 65.830 of our rules n62 define explicitly those items to be included in, or excluded from, the interstate rate base. The Bureau cannot properly address any additional exclusions in an RAO letter, which under Section 32.17 of our rules n63 must be limited to explanation, interpretation, and resolution of accounting matters. Accordingly, the portion of RAO 20 that addresses the rate base treatment of prepayments and accrued liabilities related to OPEBs is rescinded.

n62 47 C.F.R. §§ 65.820, 65.830.
n63 47 C.F.R. § 32.17.

## IV. PETITION FOR RECONSIDERATION

26. Bell Atlantic filed a Petition for Reconsideration of RAO 20 on June 3, 1992. Since this Order addresses the issues raised in that petition, we dismiss it as moot.

## V. NOTICE OF PROPOSED RULEMAKING

### A. Preliminary Matters

27. Today, we rescind that portion of RAO 20 addressing the rate base treatment of prepayments and accrued liabilities related to OPEBs. n64 In ordering such rescission, we base our action solely on procedural grounds, and render no decision on the substantive merits of the ratemaking practices at issue. n65 In this Notice of Proposed Rulemaking, we propose amendments to Part 65, Subpart G of our rules, to revise the rate base treatment of prepaid OPEB costs recorded in Account 1410, Other Noncurrent Assets, and all items in Account 4310, Other Long-Term Liabilities, including accrued liabilities related to OPEBs.

n64 See supra part III.B.3, para. 25.
n65 See supra part III.B.

28. Several investigations of LEC tariffs that include exogenous adjustments for OPEB costs are pending. n66 The applicants and some commenters have suggested that we defer modifying our Part 65 regulations until the conclusion of these investigations. n67 Although we do not agree that we should delay our action proposing to modify Part 65 to require the exclusion from the rate base of all items in Account 4310, including accrued liabilities related to OPEBs, we invite comment on this issue.

n66 See discussion supra part II, paras. 8-10.
n67 See discussion supra part III.B.2, paras. 22-24.

29. RAO 20 instructed carriers to include in their rate bases the interstate portion of prepaid postretirement benefits recorded in Account 1410, Other Noncurrent Assets, and to remove from their rate bases the interstate portion of unfunded, accrued postretirement benefits recorded in Account 4310, Other Long-Term Liabilities. n68 The stated rationale for this treatment was that "postretirement benefits are similar to pension expenses . . . and as such should be given the same rate base treatment." n69 Under our current rules, unfunded accrued pension costs recorded in Account 4310 are removed from the rate base, n70 and prepaid pension costs in excess of the SFAS-87 periodic pension cost calculation recorded in Account 1410 are included in the rate base. n71 The FASB has commented on the similarity between SFAS-106, Employers' Accounting for Postretirement Benefits Other Than Pensions, and pension accounting statements SFAS-87 and SFAS-88. n72 "Different accounting treatment is prescribed [in SFAS-106] only when the [FASB] Board has concluded that there is a compelling reason for different treatment." n73 We tentatively agree with the conclusion in RAO 20 that the similarity between OPEB amounts and pension expenses recorded in Accounts 4310 and 1410 justifies this rate base treatment for OPEB amounts, as well as pension expenses, recorded in each of the accounts.

n68 RAO 20, supra note 1, at 2873.
n69 Id. at 2872-73 (emphasis added).
n70 47 C.F.R. § 65.830(a)(3).
n71 See Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, Report and Order, 3 FCC Rcd 269, para. 43 & n.32 (1987) (citing Use of Certain Generally Accepted Accounting Principles in Part 32 of the Commission's Rules, Memorandum Opinion and Order, 2 FCC Rcd 6675 (1987) (discussing in paragraphs 14 and 15 the inclusion of prepaid pension costs exceeding the SFAS-87 cost calculations in the rate base)), recon., Order on Reconsideration, 4 FCC Rcd 1697 (1989), remanded sub nom. Illinois Bell Tel. Co. v. FCC, 911 F.2d 776 (D.C. Cir. 1990), on remand, Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, Decision on Remand, 7 FCC Rcd 296 (1991), aff'd sub nom. Illinois Bell Tel. Co. v. FCC, 988 F.2d 1254 (D.C. Cir. 1993).

n72 SFAS-106, para. 11 n.6.
n73 Id. (discussing similarities in subheading "Similarity to Pension Accounting" in Summary and identifying major similarities and differences in Appendix B).

**B. Proposed Rule**

**1. Account 1410**

30. At this time, under Section 65.820(c), amounts recorded in Account 1410 are included in the rate base "only to the extent that they have been specifically approved by

this Commission for inclusion." SFAS-87 and SFAS-106 set forth standards for calculating the future pension and OPEB costs companies should accrue in the current period. When companies prepay these costs by, for example, paying amounts in excess of the current period expense into employee pension funds, they record these excess contributions in Account 1410. Under our current rules, with the rescission of the rate base portion of RAO 20, prepaid pension costs recorded in Account 1410 are included in the rate base, n74 but prepaid OPEB costs recorded in Account 1410 are not included in the rate base. n75 Both types of excess prepayments, however, produce returns that reduce the pension amounts companies must accrue in future periods. Because investors fund these excess prepayments, we propose to include both types of excess prepayments in the rate base. We invite comment on this proposal.

n74 See Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, Report and Order, 3 FCC Rcd 269, para. 43 & n.32 (1987) (citing Use of Certain Generally Accepted Accounting Principles in Part 32 of the Commission's Rules, Memorandum Opinion and Order, 2 FCC Rcd 6675 (1987) (discussing in paragraphs 14 and 15 the inclusion of prepaid pension costs exceeding the SFAS-87 cost calculations in the rate base)), recon., Order on Reconsideration, 4 FCC Rcd 1697 (1989), remanded sub nom. Illinois Bell Tel. Co. v. FCC, 911 F.2d 776 (D.C. Cir. 1990), on remand, Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, Decision on Remand, 7 FCC Rcd 296 (1991), aff'd sub nom. Illinois Bell Tel. Co. v. FCC, 988 F.2d 1254 (D.C. Cir. 1993).
n75 47 C.F.R. § 65.820(c).

31. We have allowed prepaid pension costs to be included in the rate base, because pension fund prepayments in excess of the SFAS-87 cost calculation earn a return, which benefits the ratepayer by reducing later expenses. n76 The proposed modification to our rate base rules governing prepaid OPEB costs recorded in Account 1410 is premised on our belief that the rationale underlying the rate base treatment of prepaid pension costs recorded in Account 1410 applies equally to prepaid OPEB costs recorded in that account. We invite comment on our tentative conclusion that prepaid OPEB costs in excess of the SFAS-106 cost calculation benefit the ratepayer and thus justify the inclusion of these prepayments recorded in Account 1410 in the rate base.

n76 See Use of Certain Generally Accepted Accounting Principles in Part 32 of the Commission's Rules, Memorandum Opinion and Order, 2 FCC Rcd 6675, paras. 14-15 (1987), cited in Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, Report and Order, 3 FCC Rcd 269, para. 43 (1987), recon., Order on Reconsideration, 4 FCC Rcd 1697 (1989), remanded sub nom. Illinois Bell Tel. Co. v. FCC, 911 F.2d 776 (D.C. Cir. 1990), on remand, Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, Decision on Remand, 7 FCC Rcd 296 (1991), aff'd sub nom. Illinois Bell Tel. Co. v. FCC, 988 F.2d 1254 (D.C. Cir. 1993).

**2. Account 4310**

32. Under our current Part 65 rules, unfunded accrued pension costs recorded in Account 4310 are removed from the rate base, n77 although other items recorded in Account 4310, such as accrued OPEB liabilities, are not removed from the rate base. We propose amending our Part 65 rules to accord to all items in Account 4310 the same rate base treatment presently accorded unfunded accrued pension costs. We would modify Section 65.830(a), which enumerates specific items to be removed from the rate base, by broadening the current reference to the interstate portion of unfunded accrued pension costs in Section 65.830(a)(3) to include the interstate portion of all items in Account 4310. We also propose conforming amendments to Section 65.830(c), broadening the current reference to the interstate portion of unfunded accrued pension costs to include the interstate portion of all items in Account 4310. We invite comment on these proposals.

n77 47 C.F.R. § 65.830(a)(3).

*Responsible Accounting Officer Letter 20, Uniform Accounting for Postretirement Benefits Other Than Pensions in Part 32; Amendments to Part 65, Interstate Rate of Return Prescription Procedures and Methodologies, Subpart G, Rate Base*, 12 FCC Rcd 2321 (1997).

## B. MCI Petition for Reconsideration of the Order to Vacate

### 1. Positions of the Parties

**25.** In our *Order to Vacate,* we rescinded the rate base instructions contained in *RAO 20.* Our decision was based on our determination that the Bureau did not have the delegated authority to change the Part 65 rules in an RAO letter.[1] MCI asks us to reconsider our decision and to reinstate the rate base instructions related to OPEB.[2] MCI states that we have broad discretion in interpreting our rules and that a rule change is not needed to determine the rate base treatment of OPEB.[3] MCI believes that because the rate base treatment of pensions was already established, and because pensions are similar to OPEB, we can apply the pension rate base rules to OPEB through an interpretation.[4] Southwestern states that our authority to interpret our rules does not include the right to change rules at will without notice and comment.[5]

**26.** The opposing parties state that we correctly concluded in the *Order to Vacate* that the Bureau has no delegated authority to modify the rate base provisions of Part 65.[6] The opposing parties also assert that it is unreasonable for MCI to conclude that we can interpret Section 65.830 of our rules as currently including the interstate portion of OPEB among those items that must be removed from the interstate rate base. The opposing parties state that the only item recorded in Account 4310, Other long-term liabilities, that should be removed from the rate base is the interstate portion of unfunded accrued pension costs.[7]

**27.** In reply, MCI states the oppositions failed to demonstrate that a rulemaking proceeding is required to change the rate base treatment of OPEB and that the oppositions failed to refute the principle that administrative agencies are afforded broad

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1 *Order to Vacate, supra* n.1 at para. 25.

2 MCI Petition at 2.

3 *Id.*

4 *Id.*

5 Southwestern Reply at 2-3.

6 Ameritech at 2; Bell Atlantic at 1; US West at 2; Southwestern Reply at 2-3.

7 Ameritech at 2; Bell Atlantic at 1-2; US West at 3.

discretion in interpreting their rules.[8] MCI also argues that, because Section 65.830(a)(3) currently lists pension costs as a rate base adjustment and because pensions are similar to OPEB, it is not unreasonable to interpret this section to require the removal of OPEB costs.[9]

**2. Discussion**

**28.** We have reviewed MCI's Petition and find that it provides no basis on which to change our *Order to Vacate* decision rescinding the ratemaking guidance for OPEB contained in *RAO 20*. As we stated in the *Order to Vacate*, the Bureau did not have the delegated authority to amend the Part 65 rules. MCI's Petition does not refute this conclusion. We also are not persuaded by MCI's argument that the Commission can amend Part 65 through an interpretation without providing affected parties with any notice of or chance to comment on the amendment.[10] Giving rate base recognition to OPEB in Part 65 would constitute a rule change for which proper notice and comment must be given. Accordingly, for the reasons stated above, we deny MCI's Petition.

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8 MCI Reply at 2.

9 *Id.* at 3.

10 5 U.S.C. §553.